In the Supreme Court of the United States,

ON APPEAL FROM THE CIRCUIT COURT OF UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

CEDAR STREET COMPANY,
Complainant and Appellant,

against

PARK REALTY COMPANY,
Defendant and Appellee.

October Term, 1909.
No. 757.

SUPPLEMENTAL BRIEF FOR APPELLANT.

Statement.

The power of Congress (1) to raise revenue for the support of the General Government, that is, its power of taxation, and (2) the power of Congress to regulate commerce with foreign nations, and among the several states, are both derived from the same article of the Constitution of the United States. In their origin, they are equal and co-ordinate powers. The power to regulate commerce is, however, exclusive of, the power to tax concurrent with, the powers of the several states.

It is a fundamental maxim of Constitutional law that all the component parts of an instrument must be so construed as to make an harmonious and indivisible whole. This rule of construction would require the application of very broad rules in determining the question of a possible conflict between any one or more of the express powers set out in the Constitution, and must be borne in mind in the following discussion.

If, however, it can be clearly shown that Congress in the attempted exercise of one of its powers has clearly exceeded its proper limitations and infringed upon or violated some inherent right from which sprang another of its powers, it is certain that such exercise would be unconstitutional.

All rights and powers not specifically granted to the federal government by the Constitution have been expressly reserved to the people and to the States by the Ninth and Tenth Amendments thereof.

One of the greatest objects of the Constitution was to foster and promote commerce between the states and for that reason the exclusive power to *regulate* the same was given to the United States.

It could not have been intended in giving the power to *regulate*, to give the power to prohibit or destroy.

Interstate commerce, or speaking broadly in the words of Chief Justice Marshall, the right of intercourse between the states by their respective citizens, is a right which neither the states nor the Federal Government could deny to the individual.

To pursue the ordinary activities of life, to buy, to sell, to carry on various trades and callings, subject to reasonable regulations is to do no more than live—and when the States relinquished their right to *regulate* interstate com-

merce and transferred it exclusively to Congress no power of prohibition was impliedly or expressly given.

The power of taxation bestowed on the general government must be exercised subject to the limitations prescribed in the Constitution. The right of the citizen to engage in interstate commerce must be exercised subject to the power of Congress to *regulate* the same. If Congress in the attempted exercise of its power to tax shall have exceeded its legitimate power and attempted to impose a tax upon a constitutional right, it then becomes clear beyond the need of argument that Congress has exceeded its power of taxation, for the power to tax is the power to destroy. If Congress creates a privilege out of a right and requires the payment of a bonus or tax, before such right can be exercised, then it can by increasing the burden of taxation destroy, to all practical intents and purposes, the existence of the right, for if the right to impose a tax *at all*, exists on the part of a legislative body, it is a right which, in its nature, acknowledges no limits (see *Bank Tax Case*, 2 Wall. 200, 17 L. Ed. 763), and it may be exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. (*McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579.)

In order to apply the above reasoning to the particular facts at issue, several things must be determined:

First. That the right of all persons as well as corporations, to engage in interstate commerce is a constitutional right and one which cannot be *taken away* or *prohibited*, although it can be *regulated* by Congress.

Second. It must be shown that taxation exceeds *regulation;* in other words, that the power to regulate does not

include the power to tax, which is equivalent to the power to destroy or prohibit.

If the above two propositions be true, the new Corporation Tax must be unconstitutional for, as to corporations engaged in such business, it is clearly a tax on the doing of the business of interstate commerce.

I.

To engage in interstate commerce is a Constitutional right and not a privilege, therefore Congress cannot prohibit the exercise of such right.

The law to support the above proposition cannot be found in any case directly in point. In fact, there are some dicta to the contrary and numerous specific instances of particular commodities or articles which have been excluded from interstate commerce, but all of such cases, it is believed, should properly be referred to the exercise of a Federal police power. Chief Justice Marshall said, in *Gibbons vs. Ogden*, 9 Wheat. page 1, in speaking of the power to regulate commerce, that "Like all others vested in Congress, it is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution", and Mr. Justice Swayne said that in exercising this power Congress had "all the powers which existed in the States before the adoption of the National Constitution and which have always existed in the Parliament in England." (*Gilman vs. Philadelphia*, 3 Wallace 713.)

The Wilson Act and the Sherman Anti-trust Act are examples of Federal legislation which are, in their effect, prohibitive. The excise taxes on tobacco, whiskey and oleomargarine (*McCray vs. U. S.*, 195 U. S. 27, 49 L. Ed. 78), have all been sustained as proper exercises of the power of Congress to tax, even though such taxation would result in the prohibition of the manufacture of the specific article taxed, and its withdrawal from the channels of interstate commerce. The imposition of an excise tax on a single article, however, is very different from the imposition of an excise tax on the "doing of interstate commerce business" by a corporation. In the lottery case, 188 U. S. 321, it was held that Congress had plenary authority over interstate commerce and might prohibit the carriage of lottery tickets from one State to another. In that case, however, the Court declared "this power may not be exercised so as to enfringe rights secured or protected by" the Constitution.

As is well stated by Mr. Calvert in his book on Regulation of Commerce "it may well be doubted whether Congress has the absolute and unlimited power to prohibit the transportation, from one State to another, of articles respecting the use of which no question of public health, public morals, public safety, or public convenience can arise."

As supporting this view there are numerous decisions in which the engaging in interstate commerce is spoken of as a constitutional right, and, of course, if it is a constitutional right, it cannot be prohibited by any Act of Congress. In the case of *Crutcher vs. Kentucky*, 141 U. S. 47, 35 L. Ed. 649, the Court was discussing the validity of a statute of Kentucky regulating the agencies of foreign express companies. In its discussion the Court said "to

carry on interstate commerce is not a franchise or a privilege granted by the State. It is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the acquisition of mere corporate facilities as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject. It has frequently been laid down by this Court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce."

Just what the Court meant by saying "unless Congress should see fit to interpose some contrary regulation on the subject" is somewhat doubtful. It might be construed to mean that Congress might prohibit the carrying on of interstate commerce by corporations, while it could not prohibit the carrying on of such commerce by individuals, but such an interpretation would not be reasonable. At any rate no such regulation has been passed and it seems to be settled at present that individuals and corporations are on the same footing in this respect.

In *Reid vs. Colorado*, 187 U. S. 137, 47 L. Ed. 115, in discussing the validity of quarantine regulations of the State of Colorado, the Court said (p. 151):

> "Now, it is said that the defendant has a right under the Constitution of the United States to ship live stock from one State to another State. This will be conceded on all hands. But the defendant is not given by that instrument the right to introduce into a State, against its will, live stock affected by a contagious, infectious, or communicable disease, and whose presence in the State will or may be injurious to its domestic animals."

In *Howard vs. Illinois Central Railroad Company*, 207 U. S. 463, Justice White, in a very able opinion, disposes of an argument made on behalf of the government in the following words:

> "It remains only to consider the contention which we have previously quoted, that the Act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely State concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the *right* to engage in interstate commerce as *a privilege* which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress."

In *Western Union Tel. Co. vs. Kansas*, 216 U. S. 1, decided January 17th, 1910, 53 L. Ed. 202, the Court spoke through Justice Harlan, as follows:

> "We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done, or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct any local business. It is of the last importance that the freedom of interstate commerce shall not be tram-

meled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States. While the general right of the States to regulate their strictly domestic affairs is fundamental in our constitutional system, and vital to the integrity and permanence of that system, that right must always be exerted in subordination to the granted or enumerated powers of the General Government, and not in hostility to rights secured by the Supreme Law of the Land."

Further on, in summing up the case, the Court said:

"The right of the telegraph company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit of the Constitution. The Company was not bound, under any circumstances, to surrender its constitutional exemption from State taxation, direct or indirect, *in respect of its interstate business* and its property outside of the State, any more than it would have been bound to surrender *any other right* secured by the national Constitution."

See also in this connection the concurring opinion of Justice White in Pullman Company vs. Kansas, 216 U. S. 56, where Justice White discusses the imposition of burdens upon corporations doing an interstate business, in the shape of taxation under State laws.

Justice White says:

". . . if a State in express terms enacted that all foreign corporations which availed of the *right* granted them by the Constitution of the United States to carry on interstate commerce within the State without the previous consent of the State, as a penalty for not obtaining that consent, be deprived of all right to transact local business, it would not, I

> assume, be contended that such an enactment was not a discrimination against the corporations to which it applied because of their possession of a *right* conferred upon them by the Constitution of the United States. And yet such must be the direct and immediate result of applying an absolute act of exclusion to corporations who are not subject to such absolute exercise of power, because of the *right* bestowed upon them by the Constitution of the United States to carry on within a State an interstate commerce business." (Italics added.)

It will be noticed that Justice White speaks throughout his entire opinion of the *constitutional right* of a corporation to engage in interstate commerce.

That this right to engage in interstate commerce applies as well to corporations as to individuals was held in several cases, among them *Paul vs. Va.*, 8 Wallace, 168, 19 L. Ed. 357:

> "This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations and corporations."

The above expressions of the Supreme Court of the United States, taken at random from numerous decisions, would seem to establish the first of the propositions laid down in the beginning of this memorandum, namely, that the Constitution of the United States grants to individuals and to corporations the right to engage in interstate commerce subject only to the *regulation* of Congress.

By the power of regulation, Congress is not given the power to prohibit.

It may be argued against the theory above presented, that the power to regulate commerce between the States is as broad as the power to regulate commerce with foreign nations and with Indian tribes, and that it had been held that Congress has the power to prohibit foreign commerce, as well as commerce with the Indian tribes, but a careful examination of the decisions involving this point will show in each case clear intimations of a distinction between the power to regulate commerce between the States and the power to regulate commerce with foreign nations and with Indian tribes.

I. C. C. v. Brimson, 154 U. S. 447.
Buttfield v. Stranahan, 192 U. S. 470.
United States v. Williams, 194 U. S. 279.
U. S. v. JuToy, 198 U. S. 253.
Oceanic Nav. Co. v. Stranahan, 214 U. S. 320.

II.

Taxation is not included within the power of regulation granted by the Constitution.

It must be conceded that the power to tax is the power to destroy or prohibit. In other words, if interstate commerce can be taxed at all, it can be taxed out of existence and thus prohibited (*McCray v. U. S.*, 195 U. S. 27).

The sole question is whether the *power to regulate* includes the *power to prohibit or destroy.*

The courts have said many times that the power to regulate does not include the power to prohibit:

Miller v. Jones, 80 Ala. 89.
Bronson v. Oberlin (O.), 52 Am. Rep. 90.
Ex Parte Patterson (Tex.), 51 L. R. A. 654.
Duckall v. New Albany, 25 Ind. 283.
McConvill v. Jersey City, 39 N. J. Law 38.
People v. Codway, 28 N. W. 101.
Mernaugh v. Orlando, 41 Fla. 433.
In re Hanck (Mich.), 38 N. W. 275.
State v. DeBar, 58 Mo. 395.
Sweet v. Wabash, 41 Ind. 7.
Andrews v. State (Tenn.), 8 Am. Rep. 8.
Ex Parte Byrd (Ala.), 4 Sou. 397.

An authority directely in point is *Muhlenbrinck v. Long Branch Comrs.* (N. J.), 42 N. J. Law 364, where it is held that the word "regulate" as used in a corporate charter authorizing a city to regulate and license a business or trade, confers no power to impose a *tax* upon such business or trade.

The weight of authority would, therefore, seem to be that taxation exceeds regulation, therefore, power to regulate is not power to tax, or to destroy.

Conclusion.

If it can be considered as established that the doing of interstate commerce business subject to reasonable regulations is a right to which every person is entitled under the Constitution of the United States, then the exercise of such right cannot be prohibited by Congress.

To tax such a right would be an admission of the power to destroy or prohibit such right, therefore, no tax would be levied by Congress *upon the right to engage in interstate commerce.*

In the opinion of Senator Flint, who had charge of the Corporation Tax Law on the floor of the Senate, a corporation included within the terms of the Act would be taxed not for doing business "as a corporation", but simply for the "privilege of doing business", for which privilege the individual would not be taxed under the law.

The Corporation Tax Law now applies to all corporations (save those specifically excepted), doing intrastate or interstate business.

In the case of a corporation doing only an interstate business, the tax would necessarily be upon the privilege of doing interstate business. If the tax is invalid as to this class of corporations, the whole law must be declared invalid.

If Congress cannot tax the business of interstate commerce or interstate commerce itself, it is hard to conceive how it can tax the privilege of doing such business.

In the case of *Western Union Telegraph Company v. Kansas*, 216 U. S. 1, decided January 19th, 1910, the Court, citing from *Leloup v. Mobile*, 127 U. S. 640, says (p. 645):

> "Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done. Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a

> State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

The above language fits this argument absolutely. Can Congress forbid the carrying on of interstate commerce by a corporation unless it will pay a tax and procure a license for the privilege? If it can, it can prohibit the transaction of such business altogether. We fail to see how Congress can tax the business of interstate commerce when it cannot tax interstate commerce itself. The exaction of a license tax (assuming that the tax now under consideration is an excise tax, and, therefore, a license tax) as a condition of doing interstate commerce business, is a tax on interstate commerce, and surely exceeds the power of Congress.

For a privilege to be the subject of taxation, it must exist before it can be taxed, that is, its existence must necessarily precede the tax, and it is not within the legitimate power of Congress to create a privilege of first prohibiting the enjoyment of the right to engage in interstate commerce, a right common to every person in the United States, and then suffer such only as will pay a specific sum of money to the United States, as a tax, the liberty of enjoying such right.

The fundamental idea of a tax is far from a regulation. The courts have defined what taxes are in numerous instances, but there does not appear to have been any case in which a tax has been held to be properly within the scope of a regulation, except, possibly, in connection with the enforcement of some police regulation. The object of

the corporation tax, as expressed in the title of the Act, Approved August 5th, 1909, is "To raise revenue, equalize duties and encourage industries." By what possible process of reasoning can such an object be construed as a legitimate regulation of commerce? And yet so far as corporations doing only an interstate business are concerned, the tax can only be sustained as a regulation of commerce, for it seems to be clear that Congress cannot under its power to tax, tax interstate commerce, or the business of carrying on interstate commerce, the same being a right guaranteed under the Constitution of the United States.

Respectfully submitted,

DAVIES, STONE & AUERBACH,
Solicitors for Appellant.

JULIEN T. DAVIES,
FREDERIC D. MCKENNEY,
Of Counsel.

415

MAR 23 1910

JAMES H. McKENN

U. S. Supreme Court.

CEDAR STREET COMPANY,

Appellant,

against

PARK REALTY COMPANY,

Appellee.

ARGUMENT FOR APPELLANT IN REPLY.

JULIEN T. DAVIES,

Of Counsel for Appellant.

New York:
Stillman Appellate Printing Co.
1910.

United States Supreme Court.

CEDAR STREET COMPANY,
Appellant,

against

PARK REALTY COMPANY,
Appellee.

No. 757.

Argument in Reply for Appellant.

The main question involved in this case is whether Section 38 of the Tariff Act of 1909 is violative of provisions of the Constitution of the United States.

First. Is this statute violative of those provisions which require a direct tax to be apportioned among the States according to population?

Second. Is the statute violative of the implied provisions of the Constitution that the United States Government shall not tax a governmental instrumentality of the States?

Third. Is the statute violative of the Fifth Amendment of the Constitution, in that it takes property without due process of law, because it is confiscatory in its nature and not a proper exercise of the taxing power, in that it taxes only corporations and similar bodies, and does not tax

co-partnerships and individuals engaged in like businesses, thus violating the fundamental tenet that taxation shall involve *equality of burden upon direct competitors?*

Fourth. Is the statute violative of the Fourth Amendment to the Constitution, in that it provides for unreasonable searches and seizures of the papers and effects of corporations?

These are the propositions to be examined:

First.

1. We assert that the tax in question is a direct tax levied upon the real and personal property of corporations through taxation of their incomes, notwithstanding that the tax falls upon the commingled incomes derived from investments by corporations of capital in real and personal property, and from profits created by labor and skill. We contend that the inclusion in the total net income of corporations of income derived from investments in real and personal property and the inclusion in the class of corporations taxed of those who do not carry on or do business leads to the result that the law as a whole must fall.

The law is drawn upon the theory that every corporation or similar body that has a net income of over five thousand dollars is presumed to be carrying on or doing business. The aspect of the law is that merely investing money, accompanied by abstention from doing or carrying on any of the business for which the corporation was organized, creates liability to pay the tax. The tax is not levied upon the business or upon the acts of the corporation in carrying on or doing business. The language of the statute is "with respect to the carrying on or doing business." These words might be omitted from the statute and its operation and effect would be precisely the same as if they were retained. The incidence, the burden, the subject

of the tax are determined by a consideration of the indispensable elements for its ascertainment. The carrying on or doing business is not one of these elements. Only two things are essential under this statute for the purpose of assessing and collecting the tax. One is that there shall be a corporation, the other is that it shall have a net income of above five thousand dollars. The case of this appellee illustrates this position. It is doing no business. All its property and assets are represented by the Hotel Leonori held by a lessee under a long lease. The appellee does not collect the rents from the occupiers of the property, and does nothing but receive from its lessee his semi-annual payments. It is an investor, pure and simple. This tax, as to the appellee, is not a tax on business, but is a tax on income.

The words in the statute "with respect to the carrying on or doing business by such corporation" are of no service in defining the subject of the tax. They are too vague, uncertain and indefinite, as indicating the subject of the tax. So far as they have any relation to that matter, they simply indicate that every corporation that has a net income is to be considered as carrying on or doing business, including corporations that are investors pure and simple and do no business of any character or description different from that performed by an individual who collects the rents of real estate or cuts coupons from bonds. The only function that these words really perform in the statute is to be taken in connection with the words "special excise tax" as qualifying them. It follows that the statute intends to designate the tax as a special excise tax with respect to the carrying on or doing business by a corporation. That is the kind of special excise tax that is here attempted to be laid, but as the net income considered includes net income from other sources than business, to wit, from property, the attempt fails and we have an income tax. There is no doubt about the intention and purport of

the statute, but these words do not add anything to the its strength, and if omitted, the statute would operate in precisely the same way and the tax be ascertained in the same way. Suppose the statute read: "Every corporation, etc., is made subject to pay annually a tax equivalent to one per centum upon the entire net income, etc." There would be no question then but that we would have an income tax, a direct tax unapportioned and therefore invalid under the ruling of this Court in the *Pollock* cases. Clearly, Congress cannot make that an excise tax by calling it such which, but for its designation as such, would not be an excise tax. The language used is equivalent to a statement that this is a special excise tax upon corporations with respect to their holding property as an investment and collecting the income thereof, equivalent to one per centum upon their net income, and if such a statement were made in the statute one would clearly have an income tax.

The vice of the statute is that it reaches and taxes and imposes a burden upon the real and personal property of corporations who are not carrying on or doing the business for which they are organized and who are merely investors, in precisely the same manner as private individuals, of accumulations of money; and that it includes in the net income of corporations, who are carrying on the business for which they are organized and incorporated, the net income from investments in real or personal property which are not used in their business and do not contribute to the profits of the business. Assuming for the purpose of argument that Congress could, by a general and sweeping dragnet of a statute, tax all corporations upon their occupations or businesses, measured by the net profits or net income of their occupations or businesses, the vital question here is, whether, in view of the fact that Congress has gone further than this and has included in the net incomes of corporations the profits of investments—the profits of the use of

real and personal property not employed in business, held and owned by the corporations purely by incidental and subordinate powers and by precisely the same tenure and under the same body of laws that real and personal property are held by individual citizens—this commingling and inseparably combining the incomes derived from business and from investment do not make the statute an income tax law and therefore invalid as a whole. We have here precisely the question that was presented in the *Pollock* cases, where the net income of corporations from investments and from business were commingled. While the Court in those cases delined to discuss, and apparently conceded, that Congress, by the exercise of the power of imposing excise taxes, might tax the profits of occupations or businesses, the law was held invalid as a whole because its necessary effect, as is the necessary effect of this statute, was to tax the income of the invested real and personal property of the corporations, and thus to tax the properties themselves, and therefore to impose a direct tax without apportionment.

In the *Spreckels* case, so much relied upon, the tax was levied upon a specific kind of business, to wit, that of refining sugar, and the Court held the necessary effect was to exclude from the operation of the law such real estate as was not employed in that business. In that case, the tax was not laid upon the net income of the refiners *from all sources,* but only upon the receipts from the businesses taxed. Does the Government concede with respect to this tax that, in making up the returns of net income, the corporations are to be permitted to exclude the net income from such real and personal property as are not employed in carrying on the business for which the corporation was organized? Clearly, no such concession can be made in view of the language of the Act, because the Act does not permit separation of income from the property and the income from business. Does the Government concede that from

the net income of the corporations taxed may be excluded the income from municipal bonds, which this Court has held are not the subject of taxation by the United States Government, or the income from United States bonds, which by solemn act of Congress have been declared to be free from all taxation? Clearly not, there is no warrant in the statute for any such exclusions. The Government is necessarily driven to adhere to the position that the net income to be taxed includes the net income from invested property, real and personal, which is not employed in the business of the corporation, and that the statute reaches every corporation which has a net income, notwithstanding it may not be carrying on or doing business which can be said to be a vocation or an occupation or in any sense the proper subject of an excise tax. The learned Solicitor-General necessarily plants himself upon the untenable position that even property not used in the business of a corporation is a "business asset", and that its income is properly a part of the measure of the value of the business.

The language of the statute is that the tax is to be "equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon the stock of other corporations." In view of this language, it was impossible that the Attorney-General could rule otherwise than as he has advised, that included in this net income must be income derived from investments from municipal bonds and bonds of the United States. It is clear that, to comply with the Act, there must be so included all income from all investments by corporations in real or personal property, although such property be not employed in the business of the corporation.

It follows that the Act necessarily imposes in part an income tax, that such part is inseparable, and that the whole statute must fail.

2. The Government naturally, in view of the decisions of this Court, makes no attempt to sustain this statute as an income tax. The strength of its argument is devoted to the proposition that this tax is laid upon corporations who do any acts which result in producing a net income of over five thousand dollars, and that such acts are carrying on or doing business within the words of the statute and are necessarily the proper subject of an excise tax.

If this be an excise tax, it must rest generally upon all the acts and all the transactions of corporations and similar bodies from which result net income. The tax is not laid upon special or enumerated businesses. It is not laid upon the business for which the corporation is organized. It is laid generally upon all its acts and all its transactions, taken as a whole, resulting in the creation of the residuum of net income from all sources. The act would mean the same in the view of the Government as if it read: "a special excise tax upon all the acts and transactions of every nature of such corporation equivalent to one per centum upon its entire net income over five thousand dollars received by it from all sources during such year." But clearly, if any such tax as this were laid upon an individual, it would be simply an income tax and nothing more. The income tax passed upon in the *Pollock* cases, *which dealt with assessments on corporations* under the statute of 1894, was upon income received from all sources. When the statute lays the tax with respect to the carrying on or doing business upon all the acts and transactions of any individual or corporation equivalent to one percentum of net income from all sources, it must be that we have nothing but an income tax, because the words "with respect to the business" of the corporation, or the individual, add nothing whatever to the idea expressed, and do not change the result effected through making the tax equivalent to one per centum of the net income received from all sources. If the tax be measured by the net income from all sources, it necessarily

takes into contemplation all the acts and all the transactions of the individual or corporation taxed.

The learned Solicitor-General makes the point that legally and practically all the property of a corporation is engaged in the business of the corporation. Legally, because the corporation is not authorized to acquire and hold property except for the purpose of its business, practically, because the accumulations strengthen the credit of the corporation, enable it to borrow money more cheaply and thus enhance the business.

The first contention amounts to this, that if the property is not being employed in the principal business of the corporation, it is *ultra vires* for the corporation to hold and manage it. But the property or accumulations under discussion are not property and accumulations held illegally, but under the authorization of incidental and subordinate powers expressly conferred in the corporate charter. A mining corporation, which, having exhausted the mineral wealth of certain lands, leases them for agricultural purposes, and turns over the rental to its stockholders, as was the case in *Coal & Mining Company v. Ladd*, 160 Mo. 435, is doing nothing illegal or *ultra vires* and yet is certainly not employing those lands in the business of mining.

As to the contention that, practically, all the property of a corporation must be devoted to its principal business, because accumulations of wealth improve the credit of a corporation, that observation is just as applicable to individuals, because reputation for possession of investments and wealth equally enlarge the credit of an individual.

Despite these contentions of the government, the *Pollock* cases are applicable. It is worth noting that the particular section (Sec. 32) of the Act of 1894, passed upon in the *Pollock* case, had no reference to a tax upon the income of individuals, but related solely to an income tax upon enumerated and "all other corporations, companies or associations doing business for profit in the United States,

no matter how created and organized, but not including partnerships". With the exception that there was there no explanation that the tax was "with respect to the carrying on or doing business" by such corporations, that section was substantially the same as the one now under consideration. It is inaccurate to say that the *Pollock* case governs this case. This *is* the *Pollock* case in a new form.

An individual carrying on a business and taxed as upon the income of his business would not be taxed on the income from his investments. If such an individual were taxed on his net income from all sources he would pay on the income from his investments and therefore pay an income tax. Investing money and collecting income is no more carrying on business when done by a corporation than it is when done by an individual.

Even in the event that the Court should hold that the Federal Government had a right to tax corporations as such and simply because they were corporations and to classify them as a subject of taxation, differentiating them from individuals and co-partnerships, nevertheless, the law would be invalid. This follows from the circumstance that the measure of the tax is the total net income of the corporation. That income necessarily consists of two parts; first, the result of the business carried on by the corporation; and, second, the return from its investments and the earnings of its properties, real and personal, not used in its business. While the net income derived from the operations of the business for which the corporation was organized might be a proper measure of the value of the right to be a corporation or the value of corporate capacity, or the business itself, the income from investments from real and personal property not used in business and held and managed precisely as a private individual would hold and manage property is in no respect a measure of anything but the value of the property itself. This statute not only imposes a tax upon the profits of the business of the corporation, but also upon the income of its property,

real and personal, and we have commingled with an indirect tax, a direct tax upon the property of the corporation, unapportioned and therefore invalid.

Here is seen the sophistry of one of the arguments of the learned Solicitor-General. He contends, and we deny, that the net income of a corporation from all sources is a just and fair measure of the value of a business or an avocation; and he contends, and we admit, that the entire net income of a corporation engaged in business is not a fair measure of the value of its real and personal property. And to illustrate these propositions he first takes the case of a corporation whose earnings are largely due to labor and very little to property, and then the case of a corporation whose earnings are largely due to property and very little to labor. We can safely admit that in any case where the profits of a corporation are due to labor and to property used in the business, no matter what the proportions may be in which labor and property contribute to the result, the net income is a fair measure of the value of the business or of the right to do business or the corporate capacity. The learned Solicitor-General evades the point of our argument, however; which is that the net income provided for in this statute is not limited to the net income derived from mingled labor and property used in the business, but includes net income derived from investments of real and personal property not used in the corporation's business; and that to the extent that such income from such invested property is included in the net income of the corporation we have a tax upon property joined to an attempted tax upon a corporate franchise or business; and that because such tax on property is a direct tax unapportioned, because it is levied upon municipal bonds and United States bonds, which cannot be the subject of taxation, and because there is no method of construing the statute by which there can be omitted from the net income of corporations so much thereof as represents earnings of exempt property or of property not used in business, and

because it cannot be supposed that Congress would have passed the statute at all if the tax had to be cut down by leaving out so much of net income as is derived from property, either exempt or not used in business, the law must be declared invalid.

Second.

It is evident that the inclusion in this statute of individual persons and co-partnerships as taxpayers would result in the tax becoming an income tax and nothing more, because it taxes net income from all sources. We are therefore driven to the conclusion that the limitation or classification of the class of taxpayers to corporations makes the existence of corporate capacity the indispensable element and the test of paying the tax. Nobody but a corporation or a similar body pays this tax. One of the controlling elements of taxability is being a corporation. The other is having a net income. If the tax is not an income tax levied on income, it is, if it be an excise tax, a tax upon corporate capacity or the right or fact of being a corporation. If it be a tax upon corporate capacity or the right or fact of being a corporation, then it must be invalid, for the reason that corporate capacity is conferred by a sovereign State and the right to be a corporation is a franchise possessing an attribute and somewhat of the power of a sovereign State. A corporation, viewed from the standpoint of its right to exist and to have corporate capacity, is a State and governmental instrumentality, and not the subject of taxation as such by the United States, apart from the taxation of its property or of its businesses in connection with the proper exercise of the taxing power within the limitations, expressed or implied, of the Constitution.

The right to be a corporation is not the subject of taxation by the United States Government. Corporate capacity is conferred by the sovereign. A corporation partakes

of the attributes of the sovereign creating it and is an exercise and the creature of sovereign power. The different States, from motives of public policy, have determined that certain businesses, such as the banking business, the insurance business, the railroad business, and in some States the water, gas, electric lighting and street transportation business, shall be carried on by corporations only, many of whom receive from the State the power of eminent domain, the right to take private property upon making compensation therefor, which taking is only justified on the ground that it is for a public use and that the corporation exercising the power of eminent domain is exercising a right of a sovereign State derived from the government creating it. It is certainly clear that public service corporations with the power of eminent domain are government instrumentalities, endowed with and exercising governmental powers, performing duties and functions which not only are often performed by the State itself but which are within the ordinary duties of the State in making provision for the health and prosperity of its citizens. It is of no consequence whether the State performs these duties directly or through the medium of its agents and instrumentalities, the corporations carrying on its governmental functions.

But it is equally for motives of public policy connected with the health and prosperity and well-being of their peoples that States provide for the transaction of many of the ordinary avocations and businesses that may be equally as well carried on by individuals, by means of the creation of corporations. The incorporation of real estate companies with power to buy and sell real estate, to improve and lease it, such as is this defendant, the Park Realty Company, leads to the utilization of valuable pieces of land by extensive improvements beyond the means of any single individual, save in exceptional cases. Such parcels of real estate, evidently, are more apt to be improved by large expenditure if a number of individuals are enabled

to join together through the medium of a corporation, than if the task were undertaken by a single individual with his private fortune. Furthermore, such corporations, affording evidence of ownership in the property by means of shares of stock, bring about the ready division and disposition of real property and tend to avoid the tying up of the title to real estate and the suspension of the power of alienation. These are the results advantageous to the community and brought about by the act of the sovereign State through its creature, the corporation.

Irrigation companies, mercantile and trading companies, steamship companies—the list may be almost indefinitely prolonged from the various activities in human affairs—are corporations which the States, by a wise system of corporate laws, encourage to enter into competition with individuals. Certainly, these various statutes are not passed from love of corporations but from motives of public policy and as aids in the government of the people and the regulation of their affairs.

With respect to our contention that the Corporation Tax, if not upon income, is, nevertheless, invalid, because violative of the implied limitation in the Constitution of the United States that Congress may not tax or otherwise impede the instrumentalities of a State, the learned Solicitor-General makes three propositions: First, that the tax is not upon the right to be a corporation, but upon the user of that right; secondly, that the franchise to be a corporation is not in reality conferred by the State, but is conferred upon the incorporators by themselves and is hence a proper subject for taxation; and, thirdly, that for the reason that the United States is supreme and the State subordinate, a Federal Tax Law must countervail, even though it interfere with the legislative independence of the States in their own sphere.

As to the first proposition. It is axiomatic that taxation involves the impairment or curtailment by the Sovereign, whether constitutionally or otherwise, of some

recognized right existing in the subject. The distinction between the right to be a corporation or similar body and the right to use the right to be a corporation or similar body is not clear. But if, as contended in the argument of the learned Solicitor-General, the user of the right to be a corporation, defined by him as the subject of the tax, is nothing more nor less than the business of the corporation; then, the tax cannot be upon such user of the franchise, because it does not fall upon the business, for the tax is not confined to the income from business, but is measured by the income of the corporation *from all sources.* No *analogy* which can be drawn from the facts in *Knowlton v. Moore* can serve to sustain the tax. There is a distinction between such legislation as is merely *permissive* or at most *regulative* in its character, such as that relating to inheritances and devolution of property by death, and that which is *creative,* such as that relating to the authorization of corporate existence. After property has devolved by death, subject to laws of the State governing such devolution, the same property is there, and there is nothing new, except that it has changed hands in accordance with law; but when men incorporate, by virtue of the creative force of the law there is brought into existence and placed in the hands of the incorporators something which they did not have before, to wit, the franchise of corporate capacity; there is, according to Blackstone, the "branch of the king's prerogative subsisting in the hands of a subject."

As to the second proposition. The contention that the franchise or right to be a corporation is self conferred, is conspicuously unfortified by authority. It is opposed to the uniform doctrine and thought of this court.

> "The creation of a corporation it is said, appertains to sovereignty. This is admitted." (Chief Justice Marshall in *McCulloch v. Maryland*).

> "No persons can make themselves a body corporate and politic without legislative authority." (Mr. Justice Bradley in *California v. So. Pac. R. R. Co.*, 127 U. S. 1 at p. 41).
>
> "Upon the other hand, the corporation is a creature of the State. * * * * * Its rights to act as a corporation are only preserved to it so long as it obeys the law of its creation." (Mr. Justice Brown in *Hale v. Henkel*, 201 U. S. 43 at p. 74).

The argument of the Solicitor-General is placed solely upon the consideration that, inasmuch as there is no compulsion upon persons to become incorporated, private persons may prevent the organization of a corporation and he asks (page 81 of brief): "May not the United States burden, if even private persons may wholly prevent, the actual existence of corporations or their franchises?"

It is almost too obvious to suggest that the power to prevent or destroy is not the power to create. Human life is the best example.

Nor does it follow, from the fact that because of the large number of applications for corporate capacity and the readiness with which many such applications may be classified, incorporation is now, in most States, under general laws, that the only part which the State has in the transaction is the regulation of the conditions under which persons may be incorporated and confer upon themselves corporate capacity. The principle involved is no different than in the creation of a corporation by patent of the Crown or by special legislative act. The State may provide the opportunity or facility to incorporate, but in each act of incorporation there is a grant of sovereign power.

As to the third proposition. The Solicitor-General finds no objection to the tax in the fact that it "will interfere with the legislative independence of the States in their own sphere (Brief for U. S., p. 82). This is based upon consideration (page 87) of the fact that a State insolvency law must give place to the bankruptcy law, and that a State law affecting interstate commerce must give way

to Congressional legislation on the subject, both instances of State legislation decidedly not within the State's own sphere but within the sphere of the express powers conferred upon the Federal Government. State banks in company with all other property interests are subject to a proper and just excise by the Federal Government, but there is nothing in *McCulloch v. Maryland* to sustain the proposition that the United States may tax the instrumentalities of the State, and indeed none of the subsequent decisions of this Court have so interpreted *McCulloch v. Maryland,* but, upon the very ground of the decision in that case, have held that within the sphere of the powers reserved to the States by the Tenth Amendment, they were not subject to be burdened or hampered by Federal taxation. This principle is based upon the necessity of the preservation of the dual character of our Government, recognized in the Constitution. Of the proposition contended for on page 87 of the Government's Brief, to wit, "the supremacy of each power of the national government over all powers of a state, whenever the two meet, and the correlative subordination of all state powers to each national power," the Court said, in Collector v. Day, 11 Wall, 113, at page 126:

> "The supremacy of the general government therefore, so much relied upon in the argument of the counsel for the plaintiff in error in respect to the question before us cannot be maintained. The two governments are upon an equality."

The case of *South Carolina v. The United States,* 199 U. S. 437, has no adverse bearing upon this branch of the argument. In that case, this Court held that a license tax by the Government of the United States upon sellers of spirits was properly imposed upon individuals who were acting for the State of South Carolina, which had monopolized that business within its borders. The Court put its decision upon the ground that, although the State in the exercise of its police powers had properly undertaken this

business, yet that it was a private business and that the agents of the State were pursuing an avocation which had been a proper subject of taxation by the United States Government before the formation of the United States and the adoption of its Constitution, and that the business and avocation of selling spirits, although carried on by an agent of the State, was therefore a proper subject of taxation by the United States. The Court did not hold that it was within the power of Congress to treat the conducting of the business by the State as an element in the liability to taxation, but merely held that Congress was not bound to make the conducting of the business by the State a basis for exemption from taxation. That case is no authority for the proposition that the United States Government can tax every corporation or similar body simply because it is a corporation, and by reason of the fact that it is a corporation, and thus impose a tax on the corporate capacity or right to be a corporation conferred by the State. No claim is here made that the business of any corporation is not the proper subject of taxation by the United States Government or that the income from any business of any corporation cannot be so taxed, provided due process of law is employed and there be *equality of burden among direct competitors.* The license tax upon the seller of spirits in South Carolina was a tax upon the business of selling spirits. Similar reasoning would allow Congress to tax the business of corporations by general laws applicable to such business and not basing the liability to taxation upon the corporate capacity in which the business was done. We do not deny the power of a government so to tax such business, together with that of individuals, according to due process of law. It will be noticed that in the *South Carolina* case there was no discrimination and no limitation of taxation upon the agents of the State, but all dealers in spirituous liquors were alike obliged to pay a license tax; and similarly we contend here, that all individuals and co-partnerships must

pay for the privilege of carrying on business if corporations are taxed upon similar businesses, in order that there should be a valid tax imposed in observance of due process of law and that the tax should avoid being laid upon either incomes or corporate capacity.

In the case of *Murray v. Wilson Distilling Company*, 213 U. S., 151, page 173, Mr. Justice WHITE said with reference to the South Carolina Dispensary case:

> "That case was concerned with the power of a State, by virtue of its legislation in regard to the sale and consumption of liquor, to destroy a pre-existing right of taxation possessed by the Government of the United States."

In no sense did the Court in either of these cases decide the general proposition that the United States could tax the right or franchise of being a corporation or of doing business in a corporate capacity.

There seems to be little room for argument against the proposition that the taxing power of the United States must fall short of reaching public service corporations possessing the power of eminent domain, and that they must be considered beyond question as governmental instrumentalities. If this be so, the statute as a whole must fall, because it cannot be considered that the Congress would have passed this statute if the enormous percentage of the possible results of the law attributable to net income of public service corporations must be subtracted from its yield.

We do not contend that the Congress cannot tax avocations or businesses within the limitation of equality of burden upon direct competitors. Our contention is that if the tax is to be considered as laid upon the right to be a corporation or the privilege of doing business in a corporate capacity or upon corporations as such, it must fall by reason of the burden imposed upon governmental instrumentalities.

Third.

The proposition of the Government is that the tax is on the business transacted by corporations, and that such business is a proper subject to be placed in a class by itself distinct and separate from similar businesses carried on by individuals, by reason of the privileges that corporations enjoy in consequence of a special system of laws that are applicable to them and not to individuals. This argument recognizes the principle for which we contend, that there is an implied limitation upon the powers of taxation by Congress to the effect that there must be reasonable and not arbitrary classification of subjects, in obedience to the great law that taxation must be so laid as to produce *equality of burden among direct competitors.* We concede, for the purposes of this argument at least, that the provision of the Constitution that excise taxes shall be uniform applies to geographical and not to any other kind of uniformity. It is, however, fundamental that arbitrary classification of subjects of taxation, without a reasonable differentiation due to the nature of the subjects under consideration, that a disregard of the great law that competitors under similar circumstances shall not be placed at a disadvantage between themselves by a more onerous burden of taxation being cast upon one than is placed up another, involves this conclusion,—that property is being taken without due process of law when these fundamental considerations are ignored in the attempted exercise of the taxing power. We unhesitatingly assert that the omission of individuals and partnerships from the operation of this statute under consideration and its limitation to corporations and its attempted taxation of corporations with respect to all their acts and transactions and with respect to all their income received from all sources, where individuals or partnerships carrying on similar businesses in competition with such corporations are not so taxed, involves an attempt to take from the corporations

their property without due process of law, and that such attempt should not receive the sanction of this Court.

But the Government, in effect, says: "Corporations and individuals are not competitors similarly situated. The corporation is carrying on its business with certain privileges and rights not possessed by individuals, under a body of legislation that does not apply to individuals." This argument wholly confounds the relation between the corporation and its competitors in business and the situation of the shareholders of the corporation. Again and again has it been held by this Court and by other courts that the corporate entity of the company is one thing, and that the interest of the shareholders in its property, in its business and in its franchises, represented and evidenced by their certificates of shares of stock, is quite another thing; that the interest of the corporation in its property is one kind of property, and that the interest of the shareholder in the shares of stock of the corporation is another kind of property; that taxation of the property of a corporation in the hands of the corporation and against the corporation is one species of taxation, and taxation of the shares in the hands of the shareholder is another kind of taxation. The whole line of decisions under which this Court held that United States bonds could not be taxed by the States through a system of taxation of its corporations or of their property, while such bonds could be in effect taxed by the States through the medium of taxing the shareholders of its corporations upon their interest in the capital stock of the corporations, rests upon this distinction. It is too late to abandon it and the present statute cannot be upheld.

The special legislation that is in the mind of the learned counsel for the Government is legislation that affects only the shareholder. Such legislation relates to freedom from liability *in solido* for the debts of the corporation, which, however, does not exist in all States, for in some States the shareholder of a corporation is liable for all its

debts and in other States to an amount equal to the par of the shareholder's stock. Legislation relative to the evidence of ownership in the capital stock of the corporation by certificates of stock and methods of transfer thereof, rules relative to the passing of title by delivery of the shares of stock, rules connected with the negotiable character, in whole or in part, of certificates of shares of stock,—all these matters affect the shareholder in his relations with the corporation, but do not affect the corporation in its relations to the business of the country or in its competition with individuals. What legislation can be said to confer upon a corporation advantages with regard to the transaction of business or the holding or conveyance of real or personal property that does not equally apply to individuals and co-partnerships? It is impossible to name any general rule or principle of law that gives a corporation as such any advantage over individuals or co-partnerships in the transaction of business, or the ownership of property, or that can be said in a general sense to afford a corporation special facilities in connection with the transaction of business or ownership of property.

This argument of the Government is intended to bring this statute within the limits of the Board of Trade case in Illinois (*Nicol v. Ames*), where a tax by the United States Government upon sales made at boards of trade or exchanges was upheld by reason of the facilities that were furnished by such voluntary associations of individuals, the Courts holding that the tax was on the facilities that such associations furnished in connection with sales of property. But there is no analogy between the cases. Indeed, in that case this Court said (173 U. S., p. 517):

> "This particular board is incorporated under an act of the legislature of Illinois, though its corporate character does not, in our judgment, form a material consideration in the inquiry."

In the transaction of business generally, corporations and individuals are subject to the same body of laws defining their rights and liabilities.

It follows that the statute must be held void and unconstitutional as an attempt to take property without due process of law, in that it provides for an arbitrary classification by taxing business of corporations and similar bodies alone, and violates the fundamental principle of *equality of burden of taxation among direct competitors.*

The operation of the statute with unequal effect upon direct competitors is in no instance more plainly shown than in the circumstance that it falls upon mutual life insurance companies and not upon savings banks. The former are within the reach of the statute, the latter, possessing no shares of capital stock, are exempt, notwithstanding mutual insurance companies possess no shares of capital stock and are not carried on for profit. Both of these classes of corporations are organized to promote thrift and habits of saving and to make provision for hard times, old age and the effects of death upon the fortunes of families. Both of these corporations are carried on only for the profit of those who are creditors of them. Both of these corporations are engaged simply in the business of investing savings that are either paid in as premiums upon policies or deposited in savings banks. These corporations are direct competitors with each other as means of hoarding the savings of the thrifty ones of the community. Yet mutual life insurance companies are taxed and savings banks are exempt. Surely, here is a case of arbitrary and confiscatory classification and the exclusion from subjects of taxation of competitors who belong in the same class with those who are included. The result necessarily is that, by the operation of the tax, the property of the mutual life insurance companies is taken without due process of law within the meaning and scope of the Fifth Amendment. It is needless to enumerate the many different kinds of businesses which, in view of the fact that many of the States now permit the formation of corporations for

the purpose of carrying on any lawful business, are carried on by corporations in direct competition with co-partnerships and individuals. It seems clear that the property of such corporations would be taken without due process of law if this tax were enforced against them, and not against individuals and copartnerships who carried on business in direct competition with them.

The provision of the statute that permits corporations to deduct from their net income interest on indebtedness not exceeding the amount of their capital stocks leads to an unreasonable and arbitrary classification among the corporations. Interest on indebtedness that has to be paid is just as much a dimunition of the profits of the corporation, if it be paid on indebtedness over and above the amount of the capital stock, as if it be paid on indebtedness equal to the capital stock. This provision bears with an especial burden upon the conservative corporations which have issued capital stock only for cash or property equal in value to the amount of stock issued, and is extremely beneficial to corporations which have recklessly, improvidently and without value received, issued large quantities of capital stock. To be sure, the statute refers to paid-up capital stock, but such capital stock may be issued for property taken at an exaggerated valuation and in that way made paid-up. This statute is an invitation to corporations not to keep down their indebtedness, but to unduly and improperly increase their capital stock. It is well known that it is comparatively easy for a corporation to enlarge its operations by acquiring property for use in its business for which it may become indebted, and extremely difficult in many instances for it to sell stock and in that way obtain the money to buy additional property. All these considerations make it plain that the effect of this provision is uniformly and improperly to discriminate between corporations who are direct competitors in the same kinds of business but which may find themselves in differing situations with regard to their comparative indebtedness and par value of issued capital stocks.

Fourth.

The vice of the provision requiring the corporation to make return is in the unrestricted character of the information sought to be elicited. The measures which have required a return of the receipts from particular licensed businesses are no precedent for such a search as is involved in ascertaining the income received by a corporation *from all sources.* Such income, as we have seen, does not depend upon any one occupation in which the corporation is engaged, but upon all the transactions and investments of the corporation, of any kind whatsoever. Requiring a return to show the facts upon which the net income of a corporation depends, leaves none of the corporation's concerns inviolate. The contention of the Government that a physical entry and search is the only sort prohibited is an anachronism. If compelling a litigant to allow inspection of his books or papers or produce them in court may, under certain circumstances, constitute an unreasonable search, surely compelling a taxpayer to make a verified statement based upon the contents of those books and papers may well be such a search. Indeed, the Supreme Court of Illinois, in *City of Clinton v. Phillips*, 58 Ill., 102, held that the requiring of a return of far more limited nature than the one under consideration was an unreasonable search, unreasonable for apparently no greater reason than that it was burdensome and necessitated an unwarranted interruption of the pursuit of a lawful business.

After the assessment has been made and after the entire process of ascertainment of the tax has been completed, the return is to be filed with the Commissioner of Internal Revenue and constitutes a public record open to inspection as such under the provisions of the sixth paragraph of this section 38 of the Tariff Act. It is believed that in no internal revenue law before the passage of this statute has any such provision ever occurred as that by which the returns of this tax are made public records and opened

to public inspection. If there be provisions in tax laws that make the sworn returns of individuals as to personal property public records, it is no precedent for the ruthless exposure of details of business to sharp and prying co-partnerships and individuals, who are competitors of corporations. It is the fact that in New York State there is no such provision with regard to publicity of personal property assessment returns, and such returns, as a matter of practice, are carefully guarded by the tax officers and are not public records.

Conclusion.

The argument of the learned Solicitor-General does not impair the fundamental propositions of appellant that the tax is unconstitutional because an unapportioned tax upon the income of property, or, if not that, because it is a tax upon the instrumentalities of the respective states, and that, in any case, it is invalid because so confiscatory in its nature and unequal in its operation as to constitute a deprivation of property without due process of law under the Fifth Amendment. The provisions with regard to the return are also unconstitutional as requiring an unreasonable search.

Dated New York, March 25, 1910.

Respectfully submitted,

JULIEN T. DAVIES,
Of Counsel for Appellant.